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State v. Rogers Appellant's Reply Brief Dckt. 35128

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)

Plaintiff-Respondent,)

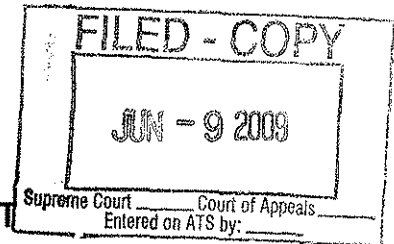
v.)

PAUL LAWRENCE ROGERS,)

Defendant-Appellant.)

NO. 35128

REPLY BRIEF



REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE RONALD J. WILPER
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

ERIK R. LEHTINEN
Deputy State Appellate Public Defender
I.S.B. # 6247
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

In early 2004, pursuant to a plea agreement, Paul Rogers pled guilty to a single count of possession of methamphetamine and was placed in the Ada County Drug Court Program. In the summer of 2004, however, he was involuntarily terminated from drug court amid allegations that he had attempted to start an adult entertainment business. Mr. Rogers appealed.

In *State v. Rogers*, 144 Idaho 738, 170 P.3d 881 (2007), the Idaho Supreme Court held that the termination procedures used in removing Mr. Rogers from drug court had violated Mr. Rogers' due process rights under the Fourteenth Amendment, and it remanded Mr. Rogers' case to the drug court for further proceedings. Upon remand though, Mr. Rogers was again expelled from the drug court program. Mr. Rogers appeals again.

In this appeal, Mr. Rogers contends that there is insufficient evidence to support one of the rules violations found by the district court found, "solicit[ing] drug court participants to work in an adult entertainment business called Desires Inc." (#35128 Tr., p.180, L.20 – p.181, L.18). In addition, Mr. Rogers contends that the district court abused its discretion in determining that termination from drug court was an appropriate sanction under the circumstances of this case.

In response, the State takes issue with Mr. Rogers' recitation of which set of rules actually applied to him during his stint in drug court, and it argues that, given its version of the applicable rules, the evidence in the record supports the district court's conclusion that Mr. Rogers violated a prohibition against one drug court participant

employing another. (Respondent's Brief, pp.5-11.) In addition, the State argues that the district court did not abuse its discretion in terminating Mr. Rogers' participation in drug court. (Respondent's Brief, pp.12-14.)

The present Reply Brief is necessary to address the State's first argument. In this Brief, Mr. Rogers asserts that the State's argument as to the set of rules that was applicable to Mr. Rogers is without merit and, furthermore, even if the State has correctly identified the set of rules applicable to Mr. Rogers, and is correct in its claim that those rules prohibited Mr. Rogers from working for another drug court participant, the reality is that there is absolutely no evidence that Mr. Rogers did work for another drug court participant.

Statement of the Facts and Course of Proceedings

The factual and procedural histories of this case (including the two previous appeals) were articulated in Mr. Rogers' Appellant's Brief and, therefore, are not repeated herein.

ISSUES

1. Is there sufficient evidence to support the district court's finding that Mr. Rogers violated the drug court rules by "soliciting drug court participants to work in an adult entertainment business?"
2. Did the district court abuse its discretion when it terminated Mr. Rogers' participation in drug court?

ARGUMENT

I.

There Is Insufficient Evidence To Support The District Court's Finding That Mr. Rogers Violated The Drug Court Rules By "Soliciting Drug Court Participants To Work In An Adult Entertainment Business"

In his Appellant's Brief, Mr. Rogers argued that even if the district court's finding that the State proved its allegation that Mr. Rogers "[s]olicit[ed] drug court participants to work in an adult entertainment business" (Motion for Discharge from Drug Court, p.2) was not clearly erroneous, that finding did not evidence a violation of any of the rules that Mr. Rogers was bound by while in drug court. (Appellant's Brief, pp.19-20.) In making this argument, Mr. Rogers cited to the contract Mr. Rogers signed when he entered drug court, and the version of the drug court handbook which the Idaho Supreme Court had found to apply to Mr. Rogers' case (the February 2002 Edition), neither of which contains any prohibition against one drug court participant asking another drug court participant to work for him. (Appellant's Brief, pp.19-20 & n.14.)

In response, the State first complains that the February 2002 version of the drug court handbook is not the version of the handbook that applied to Mr. Rogers. (Respondent's Brief, pp.5, 6-10.) The State offers a number of reasons why a different version of the handbook, the September 2002 Edition, should now be accepted as controlling: first, following remand of Mr. Rogers' case to drug court, one of the State's witnesses testified that the September 2002 Edition of the handbook was in effect when Mr. Rogers was first admitted into the drug court program (Respondent's Brief, p.7); second, Mr. Rogers implicitly admitted that the September 2002 Edition of the handbook was the one that he received because he "admitted reading the handbook, including the

part about drug court participants not being employed by other drug court participants” (Respondent’s Brief, p.7); third, Mr. Rogers’ reference to the February 2002 Edition of the handbook on appeal is an impermissible attempt to introduce new evidence on appeal because the version of the handbook was not cited by the defense during the evidentiary hearing following the remand of Mr. Rogers’ case to drug court (Respondent’s Brief, p.8); and fourth, the Idaho Supreme Court’s prior determination that the February 2002 Edition of the handbook was applicable is no longer controlling because that factual determination was not the “law of the case,” Mr. Rogers’ description of it as the “law of the case” was not supported by a citation to any authority, and Mr. Rogers did not make a “law of the case” argument below (Respondent’s Brief, pp.9-10). For a host of reasons, the State’s arguments are generally without merit.¹ However, even if the State’s arguments did have merit, and even if we were to assume that the September 2002 Edition of the handbook governed Mr. Rogers’ conduct in the drug court program, for the reasons set forth below, there still is not any evidence that

¹ Although the State is technically correct in arguing that the “law of the case” doctrine does not apply to factual findings (as collateral estoppel would apply to factual findings), the reality is that the Idaho Supreme Court has already determined that the February 2002 Edition of the handbook was the one that governed Mr. Rogers’ participation in the program. Accordingly, the State’s present attempt, supported in part by its exaggerated claim that Mr. Rogers conceded that the September 2002 Edition of the handbook was the version of the handbook that he was given (*compare* Respondent’s Brief, p.7 (alleging the Mr. Rogers admitted reading the portion of the handbook “about drug court participants not being employed by other drug court participants”) *with* Tr., p.131, L.13 – p.132, L.4 (Mr. Rogers’ testimony that he did not remember reading any such rule in the handbook he had been provided, and speculating that he must have forgotten about reading that rule, because he did read the handbook)), to have this Court believe that the September 2002 Edition of the handbook controls, is without merit. Moreover, its claim that Mr. Rogers’ mention of the February 2002 Edition of the handbook on appeal is somehow improper, or at least impermissible, is highly questionable given that, in the first appeal in this case (No. 31264), the State moved to augment the record on appeal

Mr. Rogers violated any drug court rules by soliciting drug court participants to work for him.

Assuming that the September 2002 Edition of the handbook controls, the State next argues that Mr. Rogers violated the rules set forth in that version of the handbook because, when he asked another drug court participant to work for him, he violated Rule 13, which states, in relevant part, that “[p]articipants may not be employed by other Drug Court participants.”² (Respondent’s Brief, pp.10-11 (quoting September 2002 Edition of the handbook).) However, Mr. Rogers’ alleged conduct would not have been a violation of this rule. It was never alleged, and there is certainly no evidence to show that, Mr. Rogers was ever employed by another drug court participant; indeed, even if all of the State’s allegations are taken as true, he did not even have any other drug court participants working for him. If anything, he merely *asked* another drug court participant to work for him. This is not a violation of the drug court rules, regardless of which version of the handbook applies.

with a copy of the September 2002 Edition of the handbook even though that version of the handbook had never been specifically identified or admitted below.

² In his Appellant’s Brief, Mr. Rogers incorrectly stated as follows: “[E]ven if the September 2002 Edition of the Handbook were controlling, that version, although it contains a thirteenth rule, says nothing about drug court participants working for one another.” (Appellant’s Brief, pp.19-20 n.14.) That statement, obviously erroneous, was the result of an inexplicable and inexcusable oversight on the part of undersigned counsel. Undersigned counsel apologizes to the State, and to this Court, for his mistake.

II.

The District Court Abused Its Discretion When It Terminated Mr. Rogers' Participation In
Drug Court

Because the State's arguments with respect to the district court's decision to terminate Mr. Rogers from drug court are unremarkable, no response is necessary. Rather, Mr. Rogers simply refers the Court back to pages 20-21 of his Appellant's Brief.

CONCLUSION

For the foregoing reasons, as well as those set forth in his Appellant's Brief, Mr. Rogers respectfully requests that this Court vacate his conviction and sentence, reverse the district court's order terminating his participation in drug court, and remand this case with an instruction that Mr. Rogers be allowed to continue in drug court.

DATED this 9th day of June, 2009.

A handwritten signature in black ink, appearing to read 'Erik R. Lehtinen', written over a horizontal line.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of June, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

PAUL LAWRENCE ROGERS
1249 GRAND STREET
BOISE ID 83702

RONALD J WILPER
DISTRICT COURT JUDGE
200 W. FRONT ST DEPARTMENT 17
BOISE ID 83702

DAVID W SIMONAITIS
ADA COUNTY PUBLIC DEFENDERS OFFICE
200 W FRONT ST DEPARTMENT 17
BOISE ID 83702
STATEHOUSE MAIL

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720 0010
Hand deliver to Attorney General's mailbox at Supreme Court



HEATHER R. CRAWFORD
Administrative Assistant

ERL/hrc